

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. CROIX  
APPELLATE DIVISION**

<b>AUGUSTE CHARLEMAGNE,</b>	)	
Appellant,	)	<b>D.C. CRIM. APP. NO. 2000/076</b>
	)	
v.	)	Re: T.C. CRIM. NO. 177/1999
	)	
<b>GOVERNMENT OF THE VIRGIN ISLANDS.</b>	)	
Appellee.	)	
	)	

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On Appeal from the Territorial Court of the Virgin Islands

Considered: September 6, 2002  
Filed: February 5, 2003

**BEFORE:**    **RAYMOND L. FINCH**, Chief Judge, District Court of the Virgin Islands; **THOMAS K. MOORE**, Judge of the District Court of the Virgin Islands; and **AUDREY L. THOMAS**, Judge of the Territorial Court, Division of St. Thomas and St. John, Sitting by Designation.

**APPEARANCES:**    **Harold R. Washington, Esq.**  
Territorial Public Defender  
St. Croix, U.S. Virgin Islands  
                  *Attorney for Appellant,*

**Joel H. Feld, Esq.**  
V.I. Department of Justice  
St. Thomas, U.S. Virgin Islands  
                  *Attorney for Appellee.*

**OPINION OF THE COURT**

**I. FACTS AND ISSUES**

Auguste Charlemagne ("Charlemagne" or "appellant") was found guilty by a jury on a three-count information for aggravated rape,

unlawful sexual contact and child abuse. Charlemagne filed a timely appeal attacking his conviction as having been obtained in violation of his Sixth Amendment right to confrontation and cross-examination and his Fifth Amendment right against self-incrimination. He also appeals his conviction for violation of section 505 of title 14 on the grounds that such statute is unconstitutionally vague in violation of the Fifth and Fourteenth Amendments.<sup>1</sup> This Court has jurisdiction over Charlemagne's appeal pursuant to 4 V.I.C. § 33.

## II. DISCUSSION

### A. Charlemagne's Sixth Amendment Rights were Not Violated by Exclusion of Evidence Pursuant to Rule 412.

Charlemagne moved in limine to introduce past sexual behavior of the alleged victim, pursuant to Federal Rules of Evidence 412. Rule 412 provides that "evidence the exclusion of which would violate the constitutional rights of the defendant" is admissible in a criminal case. Charlemagne contends that the trial court's denial of his motion violated his Sixth Amendment right to confront

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<sup>1</sup> Charlemagne also raises various constitutional challenges relating to title 16 of the Virgin Islands Code. However, Charlemagne was not convicted for any crime under title 16 and therefore lacks standing. Charlemagne was convicted as follows:

ADJUDGED that the defendant is convicted of Aggravated Rape (Count 1); Unlawful Sexual Contact (Count 2), and Child Abuse (Count 3), pursuant to 14 V.I.C. §§ 1699(d), 1700(a); 1708(1)(3); and 503(a)(c) respectively. . . .  
(Appendix ["App"] at 1-2).

and cross-examine witnesses.

Although the Court reviews the trial judge's exclusion of defendant's proffered evidence for abuse of discretion, it reviews challenges to rulings excluding evidence proffered by the defense de novo when the objections are based on Sixth Amendment confrontation rights. See *United States v. Powell*, 226 F.3d 1181, 1198 (10th Cir. 2000). In this case, the trial judge acted correctly in excluding Charlemagne's proffered testimony under Rule 412.

Charlemagne proffered evidence that the alleged victim, his minor child, had engaged in sexual intercourse with a boy and that Charlemagne had disciplined his child for this sexual conduct. Charlemagne sought to introduce such evidence at trial to allow the jury to infer that the alleged victim fabricated that Charlemagne had sexual intercourse with her in retaliation for Charlemagne's disciplining her for having sexual intercourse with the boy.

The Ninth Circuit Court of Appeals was faced with a similar set of circumstances in the case of *United States v. Payne*, 944 F.2d 1458, 1469 (9th Cir. 1991). The Ninth Circuit recognized that the Sixth Amendment does not provide an unrestricted right to cross-examine witnesses:

The right to confront witnesses includes the right to cross-examine witnesses to attack their general credibility or to show their possible bias or

self-interest in testifying. The right is not unlimited, however, and a trial judge retains wide discretion in limiting the scope of cross-examination.

*Id.* (citations omitted).

The court examined the probative value of the proposed cross-examination and found it "minimally (if at all) probative of [defendant's] claim of bias." *Id.* The court found that the evidence that the alleged victim was disciplined was relevant to the alleged victim's purported motive to fabricate charges, but that the nature of the incident leading to the discipline had no probative value. *Id.* Accordingly, the trial court permitted the defendant to conduct a "sanitized cross-examination" about the incident which informed the jury that the alleged victim had been disciplined by the defendant without revealing the nature of the incident. *Id.*

Here, as in *Payne*, the evidence that Charlemagne disciplined the alleged victim is relevant to the alleged victim's purported motive to fabricate charges. Similarly, the reason that Charlemagne disciplined the alleged victim is not relevant. Accordingly, the trial court's exclusion of the alleged victim's sexual behavior did not violate the confrontation clause. Because the trial judge did not err in excluding the proffered evidence under Rule 412, this Court does not reach Charlemagne's argument that the trial judge abused his discretion by excluding the same

evidence under Rule 403 of the Federal Rules of Evidence. See *Powell*, 226 F.3d at 1199.

**B. Charlemagne's Fifth Amendment Right Against Self-Incrimination Was Not Violated by Admission of his Videotaped Confession.**

On appeal, Charlemagne argues that he was psychologically coerced to continue his confession after he indicated that he no longer wanted to answer any further questions. The Supreme Court in *Miranda v. Arizona* ruled that "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." 384 U.S. 436, 473-474 (1966). "Whether the suspect has indeed invoked that right, however, is a question of fact to be decided in the light of all the circumstances." *People v. Hayes*, 699 P.2d 1259, 1262 (Cal. 1985).

Unfortunately, Charlemagne did not append a copy of his videotaped confession so that the Court could review the circumstances surrounding his alleged invocation of the right to counsel. The only evidence before this Court referring to Charlemagne's indicating that he wished to remain silent is Charlemagne's cross-examination of the police officer who conducted the interrogation:

Q. Now, you stated earlier, initially, he didn't quote, come out, to use your term, and say what happened? Did you

not treat that as a denial to give a statement, sir?

A. No, sir.

Q. You continued to question him?

A. I questioned him regarding the allegations that was presented and he didn't respond to me as if he is not willing to answer. He was just shy. He appeared to be embarrass because it's an embarrassing thing to talk about.

Q. At any time during the interrogation, did Mr. Charlemagne said he did not want to continue?

A. He said almost to the end of the tape when I stopped the tape recording, he didn't want to answer any more. It was embarrassing to him to talk how the sexual act occurred.

(Motion to Suppress Transcript, dated Feb. 29, 2000, p.22, 1.18-p.23, 1.9.)

From this colloquy, it appears that Charlemagne did not stop responding to the questions posed to him until inquiries were made concerning the details of the alleged sexual acts to which he had already admitted and that the police officer then stopped the tape recording. Thus, absent a copy of the videotape, the Court must conclude that the police officer respected Charlemagne's refusal to answer further questions by discontinuing the interrogation.

**C. Section 505 of Title 14 is Not Vague as Applied to the Charges Against Charlemagne.**

In Count Three, the Government of the Virgin Islands ("government") charged Charlemagne with child abuse under the first

charging phrase of section 505 of title 14 of the Virgin Islands Code, which provides in pertinent part that "[a]ny person who abuses a child . . . shall be punished by a fine of not less than \$500, or by imprisonment of not more than 20 years, or both." 14 V.I.C. § 505. Specifically, the government charged that Charlemagne violated 14 V.I.C. § 505 by abusing a 15 year-old minor by having sexual intercourse with her "and by coercing and using his position of authority to accomplish the unlawful act." (Supplemental Appendix ["Supp. App."] at 11). Charlemagne challenges his conviction for violation of 14 V.I.C. § 505 on the grounds that such statute is unconstitutionally void for vagueness. The vagueness doctrine is based on the due process clauses of the Fifth and Fourteenth Amendments which have been made applicable to the Virgin Islands pursuant to section 3 of the Revised Organic Act of 1954, 48 U.S.C. § 1561. This Court's review of the trial court's application of legal precepts and statutory construction is plenary. *Government v. John*, 159 F. Supp.2d 201, 205 (D.V.I. App. 1999).

Section 505 of title 14 contains three charging phrases:

First phrase: "Any person who abuses a child, or"  
Second phrase: "who knowingly or recklessly causes a child to suffer physical, mental or emotional injury, or"  
Third phrase: "who knowingly or recklessly causes a child to be placed in a situation where it is reasonably foreseeable that a child may suffer physical, mental or emotional injury or be deprived of any of the basic

necessities of life . . . ."

*Id.* at 203 n.3.

Charlemagne argues that the references to "mental or emotional injury" in the second and third charging phrases are unconstitutionally vague. However, Charlemagne was not charged with the second or third charging phrases, but only with the first charging phrase. "Before a defendant may mount a vagueness challenge to a statute which does not involve the First Amendment, she must first establish her standing to do so, namely, demonstrate that the statute is vague as applied to the facts of the particular charge against her." *Id.* at 204-05. Charlemagne has no standing to challenge the second or third charging phrases as unconstitutionally vague because he was not charged under either of these phrases.

Even if he had been charged under the second or third phrases, this Court would not reverse his conviction. Charlemagne's alleged conduct, sexual intercourse with a 15 year-old minor, is encompassed by the language of the second and third charging phrases as well. *See id.* at 206.

The first charging phrase is not vague as applied to Charlemagne's alleged conduct. "To pass muster under the vagueness doctrine, a statute must provide adequate notice and guidelines for enforcement." *Id.* at 204; *See Kolender v. Lawson*, 461 U.S. 352,



357 (1983) ("[A] penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."). Section 503(a) of title 14 provides a definition for "abuse." Included within that definition is "sexual conduct with a child," and a "child" is defined in section 503(c) as "any person under the age of eighteen (18) years." A person of common intelligence would understand that sexual intercourse with a 15 year-old is within the scope of sexual conduct that is prohibited.<sup>2</sup>

### III. CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed.

**DATED** this 5 day of February 2003.

**A T T E S T:**  
**WILFREDO F. MORALES**  
**Clerk of the Court**

/s/

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**By: Deputy Clerk**

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<sup>2</sup> Charlemagne argues that reference in Count Three of the Third Amended Information to "sexual contact" is unconstitutionally vague. (App. at 31, Third Amended Information). However, the Third Amended Information was amended to replace the phrase "sexual contact" with the phrase "sexual intercourse." (Supp. App. at 8-9, Order Granting Amendment to Information).

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**Joel H. Feld, Esq.**  
V.I. Department of Justice  
St. Thomas, U.S. Virgin Islands  
*Attorney for Appellee.*

ORDER OF THE COURT
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PER CURIAM.

**AND NOW** this 5 day of February 2003, having considered arguments and submissions of the parties, and for the reasons set forth in the Court's accompanying opinion of even date, it is hereby

**ORDERED AND ADJUDGED** that the judgment of the trial court is  
**AFFIRMED.**

**A T T E S T:**  
**WILFREDO F. MORALES**  
**Clerk of the Court**

**/s/**

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**By: Deputy Clerk**

**Copies (with accompanying opinion) to:**  
Judges of the Appellate Panel  
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